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No. ___

IN THE

Supreme Court of the United States

DONNOVAN BULGIN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Where a sentence is imposed in excess of the statutory maximum invoked by the elements of the offense alleged in the indictment and found by the jury, does such a sentence exceed the jurisdiction of the district court and therefore constitute *per se* reversible error?

II. If the Court determines that plain error review applies, whether the imposition of a sentence in excess of the statutory maximum is plain error because it affects the defendant's substantial rights and the fairness and integrity of the judicial proceeding and there is conflict among the circuits as to this issue.

III. Whether a law enforcement officer has a good faith basis to believe a third party has apparent authority to give consent to search a vehicle when the police officer knows that the third party does not own the vehicle and the third party is not in actual possession of the vehicle when the officer obtains consent for the search.

IV. Whether the imposition of an enhanced sentence for illegally reentering the United States after deportation pursuant to 8 U.S.C. § 1326(b)(2), violates the Fifth and Sixth Amendments in light of *Apprendi v. New Jersey* 530 U.S.466 (2000) when the indictment failed to allege that the deportation was subsequent to a conviction for an aggravated felony?

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PETITION FOR A WRIT OF CERTIORARI

Donnovan Bulgin respectfully petitions the Supreme Court of the United States for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit, rendered and entered in case number 00-14543-DD in that court on June 14, 2001, *United States v. Donnovan Bulgin*, an unpublished opinion, which affirmed the judgment and commitment of the United States District Court for the Southern District of Florida.

OPINION BELOW

A copy of the decision of the United States Court of Appeals for the Eleventh Circuit, which affirmed the judgment and commitment of the United States District Court for the Southern District of Florida, is contained in the Appendix (A-1).

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and PART III of the RULES OF THE SUPREME COURT OF THE UNITED STATES. The decision of the court of appeals was entered on June 14, 2001. This petition is timely filed pursuant to SUP. CT. R. 13.1. The district court had jurisdiction because petitioner was charged with violating federal criminal laws. The court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742, which provide that courts of appeals shall have jurisdiction for all final decisions of United States district courts.

STATUTORY AND OTHER PROVISIONS INVOLVED

Petitioner intends to rely upon the following constitutional and statutory provisions:

U.S. Const. Amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . .

21 U.S.C. § 841

(a) Unlawful acts

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance . . .

(b) Penalties

Except as otherwise provided in section 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a violation of subsection (a) of this section involving—

> (iii) 50 grams or more of a mixture or substance described in clause (ii) which contains cocaine base; . . .

such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life. . . . If any person commits a violation of this subparagraph . . . after two or more prior convictions for a felony drug offense have become final, such person shall be sentenced to a mandatory term of life imprisonment without release. . . Any sentence under this subparagraph shall, if there was a prior conviction, impose a term of supervised release of at least 10 years in addition to such term of imprisonment . . .

(1)(B) In the case of a violation of subsection (a) of this section involving—

> (iii) 5 grams or more of a mixture or substance described in clause (ii) which contains cocaine base . . .

such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years. . . . If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 10 years and not more than life imprisonment . . . Any sentence imposed under this subparagraph shall, . . . if there was [] a prior conviction, include a term of supervised release of at least 8 years in addition to such term of imprisonment. . . .

(1)(C) In the case of a controlled substance in schedule I or II, . . . except as provided in subparagraphs (A), (B), and (D), such person shall be sentenced to a term of imprisonment of not more than 20 years . . . If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 30 years . . . Any sentence imposing a term of

imprisonment under this paragraph shall, in the absence of a prior conviction, impose a term of supervised release of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 6 years in addition to such term of imprison ment . . .

8 U.S.C. § 1326

(a) Subject to subsection (b) of this section, any alien who—

(1) has been ..... deported ...., and thereafter

(2) ..... is at any time found in the United States, unless (A) prior to his re-embarkation at a place outside the United States or his application for admission from foreign contiguous territory, the Attorney General has expressly consented to such alien's reapplying for admission..... shall be fined under Title 18 and imprisoned not more than 2 years.

(b) Criminal Penalties for reentry of certain removed aliens Notwithstanding subsection (a) of this section, in the case of any alien described in such subsection—

(2) whose removal was subsequent to a conviction for commission of an aggravated felony, such alien shall be fined under such Title, imprisoned not more than 20 years, or both...

STATEMENT OF THE CASE

The Indictment

On April 14, 2000, the government filed a three count indictment against petitioner Bulgin. Count one of the indictment alleged that from 1995 to March 3, 2000, Mr. Bulgin knowingly and intentionally conspired to distribute a Schedule II controlled substance, that is, a mixture and substance

containing a detectable amount of cocaine, in violation of Title 21, United States Code, Section 841(a)(1), all in violation of Title 21, United states Code, Section 846.

Count two of the indictment charged that on March 3, 2000, Mr. Bulgin knowingly and intentionally possessed with intent to distribute a Schedule II controlled substance, that is, a mixture and substance containing a detectable amount of cocaine, in violation of 21 U.S.C. § 841(a)(1). Counts one and two contained no allegations as to the amount of cocaine. R1:16

Count three of the indictment charged Mr. Bulgin with knowing and unlawful presence in the United States after having been previously deported without the Attorney General having expressly consented to Mr. Bulgin reapplying for admission. In count four of the indictment, the government sought forfeiture pursuant to 21 U.S.C. 21 853. On June 5, 2000, Mr. Bulgin pled guilty to the illegal reentry count and a jury was selected for the trial on the conspiracy and possession of cocaine counts.

The Motion to Suppress

Prior to the jury being sworn, the district court heard Mr. Bulgin's motion to suppress evidence. Between March 1, 2000 and March 3, 2000, Officer Wallace Vance of the Coral Gables Police Department was part of a task force conducting surveillance on Grantly Calvin who was suspected of drug trafficking and money laundering. On March 1, Mr. Calvin was observed at the Palm Beach County Jail posting a bond for Mr. Bulgin who had been arrested for domestic violence. After Mr. Bulgin was released, the law enforcement officers followed Bulgin and Calvin to Bulgin's residence in Wellington, Florida.

On March 2, 2000, beginning at approximately 7:30 a.m., law enforcement officers continued their surveillance of Grantly Calvin. Sometime during the late afternoon or early evening, Officer Vance observed Mr. Calvin with Mr. Bulgin

in Palm Beach. Officer Vance observed Mr. Bulgin and Mr. Calvin transport some gym equipment to a residence in Miramar and move vehicles in out of the garage. The surveillance was discontinued at 1:00 a.m.

On March 3, 2000, the surveillance resumed at 7:30 a.m. Law enforcement officers followed Mr. Calvin to an auto dealership where Mr. Calvin bought some auto parts. Mr. Calvin then proceeded to an address in Broward County, where he met two or three individuals in a parking lot. At 3:30 in the afternoon, Officer Vance conducted a traffic stop on Mr. Calvin's vehicle. Officer Vance told Mr. Calvin that he knew of Mr. Bulgin's and Mr. Calvin's money laundering and drug activities, and that Mr. Bulgin had already been arrested. Mr. Calvin agreed to cooperate and consented to a search of his residence in Pembroke Pines.

Mr. Calvin advised the officer that he had a large bag of money hidden at his residence that Mr. Bulgin had given him to hold because Mr. Bulgin did not want his wife to find the money. The police searched Mr. Calvin's residence and seized over $500,00.00 in cash and two firearms. Mr. Calvin also gave Officer Vance written consent to search Mr. Bulgin's vehicle, which was parked at another residence in Pembroke Pines. The search of Mr. Bulgin's vehicle uncovered ninety kilograms of cocaine.

During the motion to suppress, Mr. Calvin testified that he and Bulgin loaded thee boxes into the vehicle on March 2nd at approximately 5:00 p.m., that Bulgin asked him to take the vehicle and Bulgin would pick the car up the next day. At the motion to suppress, Mr Bulgin argued that Mr. Calvin did not have the authority to give valid consent to the warrantless search of his vehicle. The district court denied the motion to suppress reasoning that Mr. Calvin had authority to give consent to the search because less than 24 hours had passed from the time Mr. Bulgin had given authority to drive and park the vehicle.

The Trial

The trial began on June 6 and ended on June 9, 2000. At trial, Mr. Calvin testified for the government as a cooperating witness. Mr Calvin testified that sometime in 1995 he assisted Mr. Bulgin with the purchase of one kilogram of cocaine for $18,000.00. After the first transaction, Mr. Calvin testified that he participated in a total of nine cocaine transactions with Mr. Bulgin in 1995. The first two transactions were for one kilogram, two transactions were for two kilograms, two transactions were for five kilograms and two transactions were for ten kilograms and one transaction was for twenty kilograms. Mr. Calvin further testified that Mr. Bulgin also purchased ten kilograms from him in 1999.

On cross examination, Mr. Bulgin admitted that he had recently pled guilty to the instant offense and another cocaine conspiracy offense involving his girlfriend. He also admitted that he had entered into a plea agreement with the government and that he hoped to receive a recommendation for a lenient sentence in exchange for his cooperation.

In addition to Mr. Calvin, Ms. El Holloway testified for the government. The government gave Ms. Holloway immunity in exchange for her testimony. Ms Holloway testified that she met and began dating Mr. Bulgin in 1994. She also stated that Mr. Bulgin paid cash for the house in Wellington and that she saw Bulgin count large sums of money on a number of occasions. In addition, Ms. Holloway testified that she saw Mr. Bulgin in possession of narcotics in 1999.

On cross examination, Ms. Holloway admitted that she and Mr. Bulgin had a recent altercation and that the government had advised her that she could have been charged with money laundering. Ms. Holloway also admitted that she had planned to end her relationship with Mr. Bulgin. The defense did not call any witnesses and the district court denied Mr. Bulgin's motion for judgment of acquittal as to both counts.

After closing arguments, the district court instructed the jury as to elements of counts one and count two. However, the district court did not instruct the jury to make a finding as to the amount of cocaine Mr. Bulgin conspired to possess or actually possessed. The jury convicted Mr. Bulgin of count one, the conspiracy count and acquitted him of count two, the possession count. The jury also returned a verdict in favor of the government on the forfeiture count.

The Sentencing Hearing

The sentencing hearing was held on August 17, 2000. As to the cocaine conspiracy count, the Pre-Sentence Investigation Report (PSI) concluded that the statutory required minimum penalty was life imprisonment pursuant to 21 U.S.C. § 21 U.S.C. 841(b)(1)(A). The PSI also claimed that the offense involved between 50 and 150 kilograms of cocaine, therefore Mr. Bulgin's base offense level was 36.

As to the illegal reentry count, Mr. Bulgin was assessed a sixteen level increase from base offense level 8 because the PSI determined that Mr. Bulgin had been previously convicted of an aggravated felony prior to his deportation. Accordingly, the PSI concluded that the maximum penalty was twenty years imprisonment pursuant to 8 U.S.C. § 1326 (b)(2).

Prior to the sentencing hearing, Mr. Bulgin filed objections to the PSI. Mr. Bulgin objected to the PSI finding that the statutory penalty for the offense of conviction was life imprisonment. Citing *Apprendi v. New Jersey*, Mr. Bulgin argued that because the indictment failed to allege any amount of cocaine, the jury convicted him of the offense described by 21 U.S.C. § 841(b)(1)(C), which is punishable by a maximum penalty of twenty years. Mr. Bulgin specifically objected to the the PSI finding that the offense involved between fifty and one hundred-fifty kilograms of

cocaine and that he should be held responsible for possessing ninety kilograms of cocaine in light of the jury's acquittal on the possession count.

In addition, Mr. Bulgin objected to the sixteen level increase to the base offense level for the illegal reentry count, arguing that the Apprendi decision required the fact of the prior conviction for the aggravated felony to be pled in the indictment and proved to a jury beyond a reasonable doubt.

The district court rejected Mr. Bulgin's *Apprendi* argument. Citing *United States v. Hester*, 199 F.2d 1287 (11th Cir. 2000), the district court ruled that drug quantity was not an element of the offense and was merely a sentencing factor which only required proof by a preponderance of the evidence. The district court found that the evidence was sufficient to support a finding of at least forty kilograms of cocaine and overruled Mr. Bulgin's objection as to the PSI finding of ninety kilograms of cocaine. In addition, the district court also overruled Mr. Bulgin's objection to the sixteen level increase for the illegal reentry count. The district court sentenced Mr. Bulgin to life imprisonment for the cocaine conspiracy count and twenty years for the illegal reentry count, to be served concurrently.

The Eleventh Circuit Decision

Mr. Bulgin timely filed a Notice of Appeal. In an unpublished opinion entered on June 14, 2001, the Eleventh Circuit affirmed Mr. Bulgin's conviction and sentence. While the Eleventh Circuit acknowledged that pursuant to *Apprendi,* drug quantity constitutes an element of the offense which must be charged in the indictment and proven beyond a reasonable doubt, the Eleventh Circuit ruled that an *Apprendi* error is subject to harmless error analysis and the error is harmless if the record does not contain evidence that could rationally lead to a contrary finding with respect to drug quantity. Without making a finding as to any specific amount

of cocaine, the Eleventh Circuit found that the evidence was overwhelming that the conspiracy involved a sufficient amount of cocaine to support the imposition of a life sentence.

In affirming the 20 year sentence for the illegal re-entry count, the Eleventh Circuit *held* that *Almendarez-Torres v. United States,* 523 U.S. 224 (1998) remains the law of the land. With respect to the motion to suppress, the Eleventh Circuit found that Mr. Calvin had apparent authority to grant consent to the search of Mr. Bulgin's automobile.

REASONS FOR GRANTING THE WRIT

I. The Court Should Grant The Writ To Resolve The Conflict Among The Circuits As To Whether A Sentence Imposed In Excess Of The Statutory Maximum Invoked By The Elements Alleged In The Indictment And Found By The Jury, Exceeds The Jurisdiction Of The District Court And Therefore Constitutes *Per Se* Reversible Error.

The Fifth Amendment indictment clause states: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury." In *Russell v. United States*, 369 U.S. 749 (1962), the Court made clear that the Fifth Amendment requires that the indictment contain all of the elements of the offense intended to be charged, and that the grand jury's failure to state each element is not a "technical" deficiency." Rather it is inherently and necessarily prejudicial to a defendant:

> "If it lies within the province of a court to change the charging part of an indictment to suit its own notions of what it ought to have been or what the grand jury would probably have made it if their attention had been called to suggested changes, the great importance which the common law attaches to an indictment by grand jury, as a prerequisite to a prisoner's trial for a crime, and

> without which the Constitution says—'no person shall be held to answer,' may be frittered away until its value is almost destroyed."

Id. at 770.

Admittedly, *Apprendi* was not a Fifth Amendment indictment clause case. Indeed, it was an appeal from a state prosecution, and the Court explained that the Fifth Amendment indictment clause had not been applied to the states *via* the Fourteenth Amendment. 120 S.Ct. at 2356 n. 10. Nevertheless, the Court cited with approval the Fifth Amendment analysis in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), *see* 120 S.Ct. at 2356 n. 3, where it previously acknowledged that *if* a "sentencing provision" actually defines a separate crime" "then the Government must write an indictment that mentions the additional element." *See Almendarez-Torres*, 523 U.S. at 226. Importantly, the Court acknowledged in *Apprendi* that "The judge's role in sentencing is constrained at its outer limits by the facts alleged in the indictment." *Apprendi*, 120 S.Ct. at 2359 n. 10.

The Eleventh Circuit, however, ignored this language from *Apprendi*. And it also ignored the well-settled rule that the omission of a crucial element from an indictment is a substantive, unwaivable, jurisdictional defect, requiring reversal without proof of prejudice. *See Stirone v. United States*, 361 U.S. 212 (1960) (deprivation of "the defendant's substantial right to be tried only on charges presented in an indictment returned by a grand jury . . . is far too serious to be treated as nothing more than a variance and then dismissed as harmless error"); *United States v. Spruill*, 118 F.3d 221, 227 (4th Cir. 1997) ("It is well established . . . that failure to recite an essential element of the offense in the indictment is not amenable to harmless error review"), *cert. denied*, 522 U.S. 1006 (1997); *United States v. Brown*, 995 F.2d 1493, 1505 (10th Cir.) ["F]ailure of the indictment to allege all the essential elements of an offense . . . is a jurisdictional defect

requiring dismissal . . . The absence of prejudice to the defendant does not cure what is necessarily a substantive, jurisdictional defect in the indictment"), *cert. denied*, 510 U.S. 935 (1993)

In this case, the statutory scheme of Title 21 U.S.C. § 841 essentially creates three separate offenses for cocaine distribution, under three subparagraphs. Subparagraph (b)(1)(A) makes it illegal to distribute cocaine in excess of 5,000 grams. The statutory maximum for that offense is life. The mandatory minimum is 10 years. Subparagraph (b)(1)(B) makes it illegal to distribute cocaine in excess of 500 grams. The statutory maximum for that offense is 40 years with a mandatory minimum of 5 years. Subparagraph (b)(1)(C) makes it illegal to distribute cocaine in amounts not covered by subparagraphs (A) and (B). The statutory maximum is 20 years with no mandatory minimum.

In count one of the indictment, the government charged Mr. Bulgin with conspiracy to distribute cocaine. The government failed to charge in the indictment the amount of the cocaine attempted to be distributed. The indictment thus charged Mr. Bulgin with conspiring to commit the offense described in 21 U.S.C. § 841(b)(1)(C) and not with the crimes described in subparagraphs (A) or (B).[1] The jury found Mr. Bulgin guilty of an offense with a statutory maximum sentence of 20 years.

When the district court sentenced Mr. Bulgin to life imprisonment, the district court in essence sentenced Mr. Bulgin for committing a crime that was not charged in the indictment nor found by the jury beyond a reasonable doubt. Based upon

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[1] Referencing subparagraph (b)(1)(B) by letter and number in the indictment is not sufficient. An indictment "must set forth each element of the crime that it charges." *Hamling v. United States*, 418 U.S. 87, 117 (1974).

the foregoing authorities, such a sentence is error *per se*. Accordingly, this court should grant the writ and reverse the decision below.

II. If The Court Determines That Plain Error Review Applies, It Should Grant The Writ To Resolve The Conflict Among The Circuits As To Whether The Imposition Of A Sentence In Excess Of The Statutory Maximum Necessarily Affects The Defendant's Substantial Rights And The Fairness And Integrity Of The Judicial Proceeding.

Following the *Apprendi* decision, the Fifth and Sixth Circuits have consistently vacated sentences for an enhanced offense whose elements were not charged in the indictment, and remanded for re-sentencing within the statutory maximum dictated by the offense charged in the indictment. Some panels of the Fifth and Sixth Circuits have simply reversed *per se* without any discussion of "plain error" or "harmless error" analysis. *See, e.g.*, *Burton v. United States*, 237 F.3d 490, 491 (5th Cir. Dec. 22, 2000) (life sentence exceeded maximum statutory penalty set forth in 21 U.S.C. § 841(b)(1), absent a showing of drug quantity or other sentence enhanceing factors; "We therefore vacate Burton's sentence and remand . . . for re-sentencing"); *United States v. Bandy*, 239 F.3d 802, 807 (6th Cir. 2001) (vacating *per se* enhanced minimum mandatory sentence that violated rule in *Castillo*); *United States v. Ramirez*, 242 F.3d 348, 351-352 (6th Cir. 2001) (vacating *per se* minimum mandatory 20-year sentence, imposed pursuant to 21 U.S.C. § 841(b)(1)(A), where drug quantity was not charged in the indictment; remanding for re-sentencing under 21 U.S.C. § 841(b)(1)(C) and in accordance with Sentencing Guidelines).

Other panels of the Fifth and Sixth Circuits apply "plain error" analysis, but find that an illegal enhanced sentence (requiring a defendant to serve more time than authorized in jail) necessarily affects "substantial rights" and is necessarily

reversible as "plain error." *See United States v. Meshack*, 225 F.3d 556, 577-578 (5th Cir. Aug. 28, 2000) (vacating life sentences and supervised release terms based upon "plain error," where life sentences and supervised release terms exceeded the statutory maximum in § 841(b)(1)(C); stating with regard to the "affecting substantial rights" prong of the "plain error" test: "in sentencing cases we have generally determined prejudice by considering whether the alleged error resulted in an increased sentence for the defendant"); *United States v. McWaine*, 243 F.3d 871, 875-876 (5th Cir. 2001) (vacating life sentence for cocaine offense even though defendant had concurrent twenty year sentence on another count; "Since his sentences are to run concurrently, the life sentence will affect the time he must serve in prison and we cannot rely on the plain error analysis to affirm his sentence"); *United States v. Page*, 232 F.3d 536, 544 (6th Cir. Nov. 9, 2000) (applying "plain error" review to sentence above statutory maximum of § 841(b)(1)(C); holding "an error affects substantial rights when the error was prejudicial, that is, when it "affected the outcome of the district court proceedings;" "There is no doubt that imposing additional years of imprisonment beyond that authorized by a jury's verdict affects a defendant's substantial rights;" "Furthermore, a sentencing error seriously affects the fairness, integrity, or public reputation of judicial proceedings when a court's error results in imposition of a sentence which is not authorized by law;" vacating as "plain error," 30-year sentenced where statutory maximum under § 841(b)(1)(C) was 20 years).

Thus, even if traditional plain error analysis applies to a sentence above the statutory maximum, the Court should hold—consistent with the view of the Fifth and Sixth Circuits—that such a sentence necessarily affects a defendant's "substantial rights." *See, e.g., Meshack*, 225 F.3d at 577-578 ("in sentencing cases we have generally determined prejudice by considering whether the alleged error resulted in an

increased sentence for the defendant"); *see also Glover v. United States*, 121 S.Ct. 696, 701 (2001) (*any* increased prison term resulting from counsel's failure to raise a proper challenge at sentencing, is "prejudice" to a defendant under *Strickland v. Washington*, 466 U.S. 668 (1984); refusing to impose a more onerous "prejudice" burden on collateral review because the sentence "result[ed] from a ruling which, if it had been error, would have been correctable on direct appeal"). Clearly, the indictment as drawn was fatally defective, and jurisdictionally deficient to the extent the government sought the enhanced penalties of §§ 841(b)(1)(A). But even if plain error review applies, the sentence should have been reversed and the case remanded for re-sentencing.

In addition, the Court should reverse the sentence in this case even if the Court adopts the plain error analysis employed by the Eleventh Circuit below. In the opinion below, the Eleventh Circuit found that the evidence was overwhelming that the conspiracy involved a sufficient amount of cocaine to support the imposition of a life sentence. This finding is clearly erroneous.

The jury acquitted Mr. Bulgin of possessing cocaine with intent to distribute on March 3, 2000. It cannot be said with any degree of certainty that the jury necessarily found that Mr. Bulgin conspired with Calvin to distribute the 90 kilograms of cocaine which was found in the Bulgin's vehicle. The other evidence relating to the conspiracy count was all testimonial and both witnesses had reasons to embellish their testimony. Therefore, the evidence with respect to the amount of cocaine involved in the conspiracy is not overwhelming and the Eleventh Circuit clearly erred in finding to the contrary.

III. The Court Should Grant The Writ To Determine Whether A Law Enforcement Officer Has A Good Faith Basis To Believe A Third Party Has Apparent Authority To Give Consent To Search A Vehicle When The Police Officer Knew That The Third Party Did Not Own The Vehicle And The Third Party Was Not In Actual Possession Of The Vehicle When The Police Officer Obtained Consent.

The validity of consent given by a third-party to search property owned by another depends upon whether the third-party possessed common authority over or some other significant relationship to the property to be searched. *United States v. Matlock*, 415, 164, 94 S.Ct. 988 (1974). The authority which justifies the third-party consent rests upon mutual use of the property by persons having joint access and control for most purposes. *Matlock*, 94 S.Ct. at 993, n.7.

The *Matlock* "joint access or control" test is applicable to third-party consent to the search of a vehicle. *United States v. Dunkley*, 911 F.2d 522 (11th Cir. 1990). However, the doctrine of third-party consent must be applied guardedly to prevent the erosion of the Fourth Amendment, since there is no requirement of probable cause and the exception is not base upon necessity. *United States v. Masurkiewicz*, 431 F.2d 839, 843 (3rd Cir. 1970). Under the rationale of Matlock, a third party in sole possession and control of the vehicle clearly has the authority to consent to its search. *Dunkley*, 911 F.2d at 526, citing *United States v. Morales*, 861 F.3d 396, 399 n. 8 (3rd Cir. 1988). Accordingly, court's generally find valid a third-party's consent to search a vehicle when the third-party is the driver of the vehicle. *See e.g., United States v. Diaz Albertini*, 772 F.2d 654 (10th Cir. 1987).

In this case, Mr. Calvin was not driving the vehicle when the request for the search was made. Consequently, he neither possessed nor controlled the vehicle at the time of the search.

Mr. Calvin was given the limited authority to park the vehicle until Mr. Bulgin reclaimed it. Mr. Calvin's possession of the keys to the vehicle at the time of the search did confer upon him the authority to waive Mr. Bulgin's rights under the Fourth Amendment. *See Mazurkiewicz*, 431 F.2d at 844. Any authority Mr. Calvin had over the vehicle ceased after he parked the vehicle.

In addition, the law enforcement officer knew that Mr. Calvin did not own the car and that Mr. Bulgin was the owner. Therefore, the officer had no good faith basis to believe that Calvin had authority to consent to the search and the cocaine seized from the trunk of Mr. Bulgin's vehicle should have been suppressed. The error is not harmless because the cocaine seized from Bulgin's vehicle was the only cocaine introduced at trial. It is highly unlikely that the jury would have convicted Mr. Bulgin without any cocaine being introduced into evidence. Therefore, this Court should vacate Mr. Bulgin's conviction and remand for new trial.

IV. The Court Should Grant The Writ To Determine Whether The Imposition Of An Enhanced Sentence For Illegally Reentering The United States After Deportation Pursuant To 8 U.S.C. § 1326(B)(2), Violates The Fifth And Sixth Amendments In Light Of *Apprendi v. New Jersey*, 530 U.S. 466 (2000) When The Indictment Failed To Allege That The Deportation Was Subsequent To A Conviction For An Aggravated Felony?

In this case, count three of the indictment charged that Mr. Bulgin was found in the United States without the Attorney General's express consent after having previously been deported. This offense is codified at 8 U.S.A. § 1326(a) and is punishable by a maximum term of imprisonment of 2 years. However, because the pre-sentence investigation report

determined that Mr. Bulgin was convicted of an aggravated felony prior to his deportation, Mr. Bulgin was sentenced to a term of imprisonment in excess of 2 years.

The offense for which Mr. Bulgin was sentenced is codified at 8 U.S.C. § 1326(b)(2) and is punishable by a maximum penalty of twenty years. Because the indictment failed to allege that Mr. Bulgin was deported subsequent to an aggravated felony, Mr. Bulgin was sentenced for committing an offense which was not alleged in the indictment nor admitted by Mr. Bulgin at his change of plea hearing.

While this Court has previously rejected the argument that the statutory scheme of § 1326 creates two separate offenses with separate statutory maximums and that the prior "conviction for commission of an aggravated felony" is a necessary element of the offense created by § 1326(b)(2). *See Almendarez-Torres v. United States*, 523 U.S. 224 (1998), the Court's decision in *Apprendi* has called into doubt the constitutional validity of the *Almendarez-Torres* decision. In *Apprendi,* the Court held that any fact that increases the penalty for a crime beyond the prescribed statutory maximum, other than the fact of a prior conviction must, be submitted to a jury and proved beyond a reasonable doubt. *Apprendi,* 530 U.S. at 490. However, the Court acknowledged that the "prior conviction" exception in its holding was a narrow exception to the general rule and that it was arguable that the logical application of the reasoning in *Apprendi* should apply if the prior conviction issue was contested. *Id.* at 489.

The Court reasoned in *Apprendi* that the Due Process Clause and the Sixth Amendment right to a trial by jury entitle a criminal defendant to a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt. *Id.* at 476-77. The Court explained that any distinction between an element and a sentencing factor was unknown to the practice of

criminal indictment, trial by jury and judgment by court during the years surrounding the founding of the Nation. *Id.* at 478. The Court further explained that as a general rule the indictment contained all the facts and circumstances which constitute the offense, stated with such certainty and precision, that the defendant be enabled to determine the species of the offense and in order that there may be no doubt as to the judgement which should be given. *Id.* The Court concluded that a judge's role in sentencing was constrained at its outer limits by the facts alleged in the indictment and found by the jury. *Id.* at 483, n.10.

The Court characterized the holding in *Almendarez-Torres* as at best an exceptional departure from historic practice. *Id.* at 487. The Court reasoned that because the *Almendarez-Torres* defendant did not challenge the fact of the prior aggravated felony at his plea hearing, the due process and Sixth Amendment concerns in allowing the judge to determine a fact which increased the punishment beyond the statutory maximum were mitigated. *Id.* at 488. In addition, the Court found no reason to revisit *Almendarez-Torres* in that the *Apprendi* defendant was not contesting the validity of the *Almendarez-Torres* decision. *Id.* at 490.

In the instant case, Mr. Bulgin did not admit to being convicted of a prior aggravated felony prior to his deportation and objected to the enhance sentence pursuant to 8 U.S.C. § 1326(b)(2) at the earliest available opportunity. Accordingly, due process and Sixth amendment concerns are implicated because the fact of the prior aggravated felony conviction was not alleged in the indictment and that fact increased the potential penalty for the offense of conviction from 2 years to 20 years imprisonment.

Under the reasoning of *Apprendi*, the fact of the prior aggravated felony conviction is an essential element of the offense described in 8 U.S.C. § 1326(b)(2). Therefore, it must be properly charged in the indictment. *See Apprendi*,

530 U.S. at 489 n.15. Accordingly, the sentence in this case was imposed in violation of Mr. Bulgin's rights under the Fifth and Sixth amendments, and must be vacated.

CONCLUSION

Based upon the foregoing petition, the Court should grant a Petition for a Writ of Certiorari to the Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

JOHNNY L. MCCRAY, JR., P.A.*
Counsel for Petitioner
400 East Atlantic Boulevard
Pompano Beach, Florida 33060
(954) 781-3662

* Counsel of Record

September 14, 2001

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

[Filed Jun 14, 2001]

No. 00-14543
Non-Argument Calendar

D.C. Docket NO. 00-00287-CR-FAM

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

DONNOVAN BULGIN, a.k.a Velton Richardson,
Defendant-Appellant,

Appeal from the United States District. Court for the Southern District of Florida

---

(June 14, 2001)

Before ANDERSON, *Chief Judge*, DUBINA and FAY, *Circuit Judges*.

PER CURIAM:

Donnovan Bulgin appeals his convictions and life sentence for conspiracy to possess with intent to distribute cocaine, 21 U.S.C. § 846, and illegally re-entering the United States after previously being deported, 8 U.S.C. § 1326(a), (b)(2). He argues that the district court erred in denying his motion to suppress the cocaine seized from his vehicle because Grantly Calvin, the individual who consented to the search of the vehicle, did not have authority to consent to the search. Bulgin also contends that the district court erred under

Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), by sentencing him based on a quantity of drugs that was not alleged in the indictment and not proven to a jury beyond a reasonable doubt. Finally, he contends that the district court erred under *Apprendi* by sentencing him based on a prior aggravated felony conviction that was not alleged in the indictment.

A district court's denial of a motion to suppress presents a mixed question of law and fact. This court reviews the district court's findings of fact for clear error and the application of law to those facts *de novo*. All facts are construed in the light most favorable to the party that prevailed in the district. court. *United States v. Behety*, 32 F.3d 503, 510 (11th Cir. 1994), *cert. denied*, 515 U.S. 1137 (1995). "A third party's consent to search an area is valid if he has mutual use of it, with joint access or control of the area for most purposes." *United States v. Brazel*, 102 F.3d 1120, 1148 (11th Cir. 1997), *cert. denied*, 522 U.S. 1060 (1998) (citing *United States, v. Matlock*, 415 U.S. 164, 171 n. 7, 94 S.Ct. 988, 993 n. 7, 39 L.Ed.2d 242 (1974)). However, even if the third party lacks the authority to consent, there is no Fourth Amendment violation if the officer conducting the search had an objectively reasonable, good-faith belief that the consent he obtained was valid. *Id.*

Because Bulgin raised his *Apprendi* arguments at sentencing, we review those issues *de novo*. *United States v. Candelario*, 240 F.3d 1300, 1306 (11th Cir. 2001). Any fact other than a prior conviction that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to the jury and proved beyond a reasonable doubt. *Apprendi*, 530 U.S. 466, 120 S.Ct. at 2362-63. In light of *Apprendi*, drug quantity constitutes an element of the offense that must be charged in the indictment and proven to a jury beyond a reasonable doubt. *United States v. Rogers*, 228 F.3d 1318, 1327 (11th Cir. 2000). An error under *Apprendi* is harmless "if the record does not contain evidence that

could rationally lead to a contrary finding with respect to drug quantity." *United States v. Nealy,* 232 F.3d 825, 830 (11th Cir. 2000).

An indictment in an illegal re-entry case does not have to allege a defendant's prior aggravated felony conviction in order for a district court to impose an enhanced sentence under 8 U.S.C. § 1326(b). *Almendarez-Torres v. United States*, 523 U.S. 224, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998). "*Almendarez-Torres* remains the law until the Supreme Court determines that *Almendarez-Torres* is not controlling precedent." *United States v. Guadamuz-Solis*, 232 F.3d 1363 (11th Cir. 2000).

Upon review of the presentence investigation report and the trial and sentencing transcripts, and upon consideration of the parties' briefs, we find no reversible error.

We conclude that the district court did not err in denying Bulgin's motion to suppress the cocaine seized from his car because Calvin bad the apparent authority to grant permission for a search by the law enforcement officer. The district court erred under *Appprendi* by sentencing Bulgin based on a quantity of drugs neither alleged in the indictment nor proven to a jury beyond a reasonable doubt. The district court's error, however, was harmless because no rational jury would have found Bulgin guilty of conspiracy without finding that the conspiracy involved a sufficient amount of cocaine to support Bulgin's life sentence. The evidence was overwhelming in this regard. Finally, the district court did not err by sentencing Bulgin based on a prior aggravated felony conviction that was not alleged in the indictment. The United States Supreme Court's holding in *Almendarez-Torres*, that the allegation of a prior aggravated felony conviction in the indictment is not a prerequisite to an enhanced sentence under 8 U.S.C. § 1326(b), remains binding precedent in this Circuit.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
Southern District of Florida

[Filed Aug 21 , 2000]

UNITED STATES OF AMERICA, v. Donnovan Bulgin a/k/a Velton Richardson	JUDGMENT IN A CRIMINAL CASE (For Offenses Committed On or After November 1, 1987) Case Number: 1:00CR00287-002 Johnny L. McCray, Jr., Esq./ Edward L. Allen, AUSA Defendant's Attorney

---

THE DEFENDANT:

X pleaded guilty to count(s) THREE of the Second Superseding Indictment

☐ pleaded nolo contendere to count(s)_____ which was accepted by the court.

X was found guilty on count(s) ONE of the Second Superseding Indictment after a plea of not guilty.

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
8 U.S.C. § 1326 (a),(b)(2)	illegal reentry	03/01/2000	THREE
21 U.S.C. § 846	conspiracy to possess with intent to distribute cocaine	03/03/2000	ONE

The defendant is sentenced as provided in pages 2 through 8 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

X The defendant has been found not guilty on count(s) TWO of the Second Superseding Indictment

☐ Count(s)_____(is)(are) dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.:
279-78-2830

Defendant's Date of Birth:
07/16/1963

Defendant's USM No.: 53777-004

Defendant's Residence Address:

F.D.C.
33 NE 4th Street
Miami FL 33128

Defendant's Mailing Address:

F.D.C.
33 NE 4th Street
Miami FL 33128

08/17/2000
Date of Imposition of Judgment

/s/ Federico A. Moreno
Signature of Judicial Officer
FEDERICO A. MORENO
United States District Judge
August 18, 2000
Date

DEFENDANT: Donnovan Bulgin a/k/a Velton Richardson

CASE NUMBER: 1:00CR00287-002

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of life.

The term of Life imprisonment is as to count ONE. It is further Ordered that the defendant shall be imprisoned for a term of 20 years as to count THREE to run concurrent with term imposed in count ONE.

☐ The court makes the following recommendations to the Bureau of Prisons:

X The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at a.m./p.m. on _____.

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____.

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office

RETURN

I have executed this judgment as follows:_____

_____

Defendant delivered on _____to_____at____,with a certified copy of this judgment.

UNITED STATES MARSHAL

By _____

Deputy U.S. Marshal

_____

DEFENDANT: Donnovan Bulgin a/k/a Velton Richardson

CASE NUMBER: 1:00CR00287-002

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 10 year(s). See Additional Supervised Release Terms-Page 4

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

X The defendant shall not possess a firearm as defined in 18 U.S.C. § 921. (Check, if applicable.)

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below).

The defendant shall also comply with the additional conditions on the attached page (if indicated below).

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) he defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: Donnovan Bulgin a/k/a Velton Richardson

CASE NUMBER: 1:00CR00287-002

ADDITIONAL SUPERVISED RELEASE TERMS

At the completion of the defendant's term of imprisonment, the defendant shall be surrendered to the custody of the Immigration and Naturalization Service for deportation proceedings consistent with the Immigration and Nationality Act.

If deported, the defendant shall not reenter the United States without the express permission of the United States Attorney General. The term of supervision shall be non-reporting if the defendant resides outside the United States. If the defendant should reenter the United States within the term of supervised release, the defendant is to report to the nearest United States Probation Office within 72 hours of his or her arrival.

DEFENDANT: Donnovan Bulgin a/k/a Velton Richardson

CASE NUMBER: 1:00CR00287-002

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B.

	Assessment	Fine	Restitution
Totals:	$ 200.00	$	$

☐ If applicable, restitution amount ordered pursuant to plea agreement. . . . . $_____

FINE

The above fine includes costs of incarceration and/or supervision in the amount of $_____.

The defendant shall pay interest on any fine of more than $2,500, unless the fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 5, Part B may be subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ The interest requirement is waived.

☐ The interest requirement is modified as follows:

RESTITUTION

☐ The determination of restitution is deferred until _____. An Amended Judgment in a Criminal Case will be entered after such a determination.

☐ The defendant shall make restitution to the following payees in the amounts listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportional payment unless specified otherwise in the priority order or percentage payment column below.

Name of Payee	* Total Amount of Loss	Amount of Restitution Ordered	Priority Order or Percentage of Payment
Totals:	$ _____	$ _____	

DEFENDANT: Donnovan Bulgin a/k/a Velton Richardson

CASE NUMBER: 1:00CR00287-002

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessment; (2) restitution; (3) fine principal; (4) cost of prosecution; (5) interest; (6) penalties.

Payment of the total fine and other criminal monetary penalties shall be due as follows:

A X in full immediately; or

B ☐ $ _____ immediately, balance due (in accordance with C, D, or E); or

C ☐ not later than _____; or

D ☐ in installments to commence _____day(s) after the date of this judgment. In the event the entire amount of criminal monetary penalties imposed is not paid prior to the commencement of supervision, the U.S.

---

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994 but before April 23, 1996.

probation officer shall pursue collection of the amount due, and shall request the court to establish a payment schedule if appropriate; or

E ☐ in _____(*e.g. equal, weekly, monthly, quarterly*) installments of $ _____ over a period of ____ year(s) to commence _____ day(s) after the date of this judgment.

The defendant will receive credit for all payments previously made toward any criminal monetary penalties imposed.

Special instructions regarding the payment of criminal monetary penalties:

☐ The defendant shall pay the cost of prosecution.

X The defendant shall forfeit the defendant's interest in the following property to the United States:

492 Cypress Green Circle in Wellington, Florida.

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalty payments, except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program are to be made as directed by the court, the probation officer, or the United States attorney.

STATEMENT OF REASONS

DEFENDANT: Donnovan Bulgin a/k/a Velton Richardson

CASE NUMBER: 1:00CR00287-002

☐ The court adopts the factual findings and guideline application in the presentence report

OR

X The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary):

See Additional Factual Finding and Guideline Application Exceptions-page 8

Guideline Range Determined by the Court:

Total Offense Level: 36

Criminal History Category: III

Imprisonment Range: Life

Supervised Release Range: 5years

Fine Range: $ 20,000.00 to $ 8,000,000.00

X Fine waived or below the guideline range because of inability to pay.

Total Amount of Restitution: $ _____

☐ Restitution is not ordered because the complication and prolongation of the sentencing process resulting from the fashioning of a restitution order outweighs the need to provide restitution to any victims, pursuant to 18 U.S.C. § 3663(d).

☐ For offenses committed on or after September 13, 1994 but before April 23, 1996 that require the total amount of loss to be stated, pursuant to Chapters 109A, 110, 110A, and 113A of Title 18, restitution is not ordered because the economic circumstance of the defendant do not allow for the payment of any amount of a restitution order, and do not allow for the payment of any of some portion of an restitution order in the forseeable future under any reasonable schedule of payments.

☐ Partial restitution is ordered for the following reason(s):

☐ The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by the application of the guidelines.

OR

☐ The sentence is with the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s):

OR

☐ The sentence departs from the guideline range

☐ upon motion of the government, as result of defendant's substantial assistance.

☐ for the following specific reason(s):

DEFENDANT: Donnovan Bulgin a/k/a Velton Richardson

CASE NUMBER: 1:00CR00287-002

ADDITIONAL FINDINGS AND GUIDELINE APPLICATIONS EXCEPTIONS

The Court ruled that the obstruction adjustment did not apply and he should receive acceptance of responsibility.

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

Case No. 00-287-CR-MORENO(s)(s)

21 U.S.C. 846
21 U.S.C. 841(a)(1)
21 U.S.C. 853
18 U.S.C. 2
8 U.S.C. 1326(a) and (b)(2).

UNITED STATES OF AMERICA,
Plaintiff,

v.

DONNOVAN BULGIN, a/k/a VELTON RICHARDSON,
Defendant.

SUPERCEDING INDICTMENT

The Grand Jury charges that:

COUNT I

From in or about 1995, to on or about March 3, 2000, the exact dates being unknown to the Grand Jury, at Dade County, Broward County, and Palm Beach County, in the Southern District of Florida, and elsewhere, the defendant,

DONNOVAN BULGIN,
a/k/a VELTON RICHARDSON,

did knowingly and intentionally combine, conspire, confederate and agree with other persons, known and unknown to the grand jury, to possess with intent to distribute a Schedule II

controlled substance, that is, a mixture and substance containing a detectable amount of cocaine, in violation of Title 21, United States Code, Section 841(a)(1), all in violation of Title 21, United States Code, Section 846.

COUNT II

On or about March 3, 2000, at Palm Beach County, and Broward County, in the Southern District of Florida, and elsewhere, the defendant,

DONNOVAN BULGIN,
a/k/a VELTON RICHARDSON,

did knowingly and intentionally possess with intent to distribute a Schedule II controlled substance, that is, a mixture and substance containing a detectable amount of cocaine, in violation of Title 21, United States Code, Section 841(a)(1), and Title 18, United States Code, Section 2.

COUNT III

On or about March 1, 2000, in Palm Beach County, in the Southern District of Florida, the defendant,

DONNOVAN BULGIN,
a/k/a VELTON RICHARDSON,

an alien, having previously been deported from the United States on or about March 15, 1994, was found to be in the United States, knowingly and unlawfully, without the Attorney General having expressly consented to such alien's reapplying for admission to the United States, in violation of Title 8, United States Code, Sections 1326(a), (b)(2).

FORFEITURE COUNT

Upon conviction of the felony offenses alleged in Counts I and II of this Indictment, which is realleged herein, as set forth in full, the United States is entitled to forfeiture of, and the defendant,

DONNOVAN BULGIN,
a/k/a VELTON RICHARDSON,

shall forfeit to the United states any and all property constituting or derived from any proceeds the defendant DONNOVAN BULGIN, a/k/a VELTON RICHARDSON, obtained, directly or indirectly as a result of said violations and any and all property used or intended to be used in any manner or part to commit or facilitate the commission of the violations alleged in Counts I and II of this Indictment, including but not limited to the following:

1. All that lot or parcel of land, together with its buildings, improvements, fixtures, attachments and easements, located at 492 Cypress Green Circle, Wellington, Palm Beach County, Florida 33414, and more particularly described as:

Lot 139, of Bink's Forrest of the Landings at Wellington, P.U.D., Plat 2, according to the Plat therein, as recorded in Plat Book 70, at Pages 162 to 175, inclusive, of the Public Records of Palm Beach County, Florida.

2. If any of the above-described property, as a result of any act or omission of the defendant:

(a) cannot be located upon the exercise of due diligence; iii

(b) has been transferred, sold to, or otherwise deposited with a third person;

(c) has been placed beyond the jurisdiction of the Court;

(d) has been substantially diminished in value; or

(e) has been commingled with other property which cannot be subdivided without difficulty, it is the intention of the United States to seek forfeiture of

any other property of said defendant up to the value of the above-described forfeitable property pursuant to Title 21, United States Code, Section 853.

A TRUE BILL

_____

FOREPERSON

/s/ Thomas E. Scott
THOMAS E. SCOTT
UNITED STATES ATTORNEY

/s/ Edward L. Allen
EDWARD L. ALLEN
ASSISTANT UNITED STATES ATTORNEY

No. 01-742

In the Supreme Court of the United States

DONNOVAN BULGIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

THEODORE B. OLSON
Solicitor General
Counsel of Record

MICHAEL CHERTOFF
Assistant Attorney General

WILLIAM C. BROWN
Attorney

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the district court committed reversible error by sentencing petitioner to life imprisonment for drug offenses, where the quantity of drugs involved in those offenses was not charged in the indictment or found by the jury beyond a reasonable doubt.

2. Whether a third party entrusted with petitioner's automobile had actual or apparent authority to consent to a police search of the vehicle.

3. Whether the Court should overrule *Almendarez-Torres* v. *United States*, 523 U.S. 224 (1998).

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21 U.S.C. 841(b)(1)(C)	5, 10
21 U.S.C. 846	2

In the Supreme Court of the United States

No. 01-742

DONNOVAN BULGIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-3a) is unpublished, but the judgment is noted at 263 F.3d 170 (Table).

JURISDICTION

The judgment of the court of appeals was entered on June 14, 2001. The petition for a writ of certiorari was filed on September 26, 2001, and is therefore untimely. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted of conspiring to possess cocaine with

intent to distribute it, in violation of 21 U.S.C. 846. Petitioner also pleaded guilty to illegally reentering the United States after having been deported, in violation of 8 U.S.C. 1326. The district court sentenced petitioner to life imprisonment on the drug trafficking count and to a concurrent term of 20 years' imprisonment on the illegal reentry count. Pet. App. 4a-5a. The court of appeals affirmed. *Id.* at 1a-3a.

1. Around 5 p.m. on March 2, 2000, petitioner and Grantly Calvin loaded three boxes of cocaine into petitioner's Toyota Solara automobile. Gov't C.A. Br. 3; 6/5/00 Tr. 45. Petitioner told Calvin to take the Toyota and hold it for him until the next day. Gov't C.A. Br. 3; 6/5/00 Tr. 35-39, 46. Petitioner also gave Calvin a bag of money to hold for him which Calvin hid in his attic. 6/5/00 Tr. 47. Calvin parked the Toyota at a house that belonged to the mother of Calvin's son, and Calvin kept the key to the automobile. Gov't C.A. Br. 3; 6/5/00 Tr. 35-40, 46.

The next day, March 3, 2000, petitioner was arrested and police officers questioned Calvin. Gov't C.A. Br. 4. Calvin consented to a police search of the Toyota, and he provided the officers with the key to the automobile. *Id.* at 5. Calvin told the police that petitioner had given him the car to hold. 6/05/00 Tr. 35. A police search of the vehicle uncovered boxes (with petitioner's fingerprints) containing 90 kilograms of cocaine. Gov't C.A. Br. 8.

2. Before trial, petitioner moved to suppress the 90 kilograms of cocaine seized from his Toyota, arguing that Calvin did not have authority to consent to a search of the vehicle. The district court denied the motion, noting that Calvin had loaded the boxes and driven the automobile, and that Calvin "had the authority to drive it, to park it, to hold it, and less than 24

hours [had] elapsed" since petitioner had entrusted it to him. Gov't C.A. Br. 5-6.

3. Petitioner thereafter pleaded guilty to the illegal reentry charge and, following a jury trial, he was convicted on the cocaine conspiracy charge. Pet. App. 4a-5a. During trial on the drug charge, the government presented evidence of the seizures of the 90 kilograms of cocaine from petitioner's automobile and of the more than $500,000 in cash petitioner had entrusted to Calvin, as well as testimony describing petitioner's past trafficking in multi-kilogram quantities of cocaine. Gov't C.A. Br. 6-8.

The district court sentenced petitioner to life imprisonment on the drug conspiracy charge, based in part on its determination at sentencing that 90 kilograms of cocaine were involved in the offense. Gov't C.A. Br. 10-11. Relying on *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), petitioner objected at sentencing to the imposition of a life sentence because the indictment did not allege the drug quantity involved in the offense. Gov't C.A. Br. 10-11. Petitioner was also sentenced to a concurrent term of 20 years' imprisonment on the illegal reentry count, based on the district court's determination that petitioner had been convicted of an aggravated felony prior to his deportation.[1] See 8 U.S.C. 1326(b)(2) (providing a 20-year maximum term of imprisonment for Section 1326 violators convicted of an aggravated felony before deportation). Again relying on *Apprendi*, petitioner objected to a sentence in excess of two years' imprisonment on the Section 1326 count

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[1] The presentence report (PSR), adopted by the district court (Pet. App. 13a), reflected that petitioner was convicted of two felony drug offenses in Ohio in 1988. PSR ¶¶ 46-47.

because his aggravated felony conviction had not been alleged in the indictment.

4. The court of appeals affirmed in a per curiam opinion. Pet. App. 1a-3a. The court affirmed the district court's denial of the motion to suppress the 90 kilograms of cocaine seized from the Toyota, reasoning that Calvin had apparent authority to grant permission for the police search of the vehicle when he consented to that search. *Id.* at 3a. The court of appeals observed that, even if a third party lacks the authority to consent to a search, "there is no Fourth Amendment violation if the officer conducting the search had an objectively reasonable, good-faith belief that the consent he obtained was valid." *Id.* at 2a-3a.

With respect to petitioner's sentence on the drug count, the court of appeals recognized that the district court had erred under *Apprendi* by sentencing petitioner to a life sentence based on a quantity of drugs that was not alleged in the indictment or submitted to the jury. Pet. App. 3a. The court held that the district court's sentencing error was harmless, however, "because no rational jury would have found [petitioner] guilty of conspiracy without finding that the conspiracy involved a sufficient amount of cocaine to support [petitioner's] life sentence." *Ibid.* The court noted that the drug quantity finding was supported by overwhelming evidence. *Ibid.*

The court of appeals also rejected petitioner's challenge to his 20-year sentence for illegal reentry in violation of 8 U.S.C. 1326. The court observed that it was bound by this Court's decision in *Almendarez-Torres* v. *United States*, 523 U.S. 224 (1998), which holds that an allegation of a prior aggravated felony conviction in the indictment is not a prerequisite to the

imposition of an enhanced sentence under 8 U.S.C. 1326(b). Pet. App. 3a.

DISCUSSION

1. Petitioner contends (Pet. 10-15) that his life sentence on the cocaine conspiracy count should be vacated in light of this Court's decision in *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), because the quantity of cocaine involved in the offense was not alleged in the indictment or found by the jury beyond a reasonable doubt. In *Apprendi*, the Court held that, as a matter of constitutional law, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 490.

a. Petitioner's cocaine trafficking offense was subject to sentencing under the graduated penalties set forth in 21 U.S.C. 841(b). Petitioner's life sentence was authorized by 21 U.S.C. 841(b)(1)(B)(ii)(II), which provides for a sentence of up to life imprisonment for a recidivist defendant, such as petitioner, who is found guilty of an offense involving 500 grams or more of cocaine. His life sentence was not, however, authorized by Section 841(b)(1)(C), which provides for a sentence of up to 30 years' imprisonment for a recidivist defendant who is found guilty of an offense involving any detectable quantity of cocaine. Consequently, petitioner's life sentence depended on an increase in the statutory maximum sentence by virtue of a fact (drug quantity) that was not included in the indictment or found by the jury to have been proved beyond a reasonable doubt. Accordingly, the imposition of a life sentence on the drug conspiracy count, on the basis of a

factual determination made by the court at sentencing, was error under *Apprendi*.

The court of appeals correctly affirmed petitioner's sentence, however, finding the *Apprendi* error harmless in light of the overwhelming drug quantity evidence, under which "no rational jury would have found [petitioner] guilty of conspiracy without finding that the conspiracy involved a sufficient amount of cocaine [500 grams] to support [petitioner's] life sentence." Pet. App. 3a.

b. Petitioner argues (Pet. 10-15) that his life sentence must be vacated because the *Apprendi* error is jurisdictional and requires automatic reversal. In *United States* v. *Cotton*, cert. granted, No. 01-687 (Jan. 4, 2002), the question presented is whether the omission from a federal indictment of a fact that enhances the statutory maximum sentence requires a court of appeals, on plain error review, to automatically vacate the enhanced sentence. The petition in this case accordingly should be held pending the Court's decision in *Cotton* and then disposed of accordingly.

2. Petitioner also renews his argument (Pet. 16-17) that Calvin did not have the actual or apparent authority to consent to the search of the Toyota. That fact-bound claim was correctly rejected by both courts below and does not merit further review.

A search of property, without warrant or probable cause, is permissible under the Fourth Amendment when justified by valid consent. *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 222 (1973). The consent must be voluntary, and the person giving the consent must have authority to do so, *United States* v. *Matlock*, 415 U.S. 164, 171 (1974), or must reasonably appear to have the authority to do so, *Illinois* v. *Rodriguez*, 497 U.S. 177 (1990). A third party may validly consent to a search of

property if the third party possesses common authority over or other sufficient relationship to the property to be searched. *Matlock*, 415 U.S. at 171 & n.7 (noting the significance of "joint access or control" over the property).

In this case, the police officers were advised by Calvin that petitioner had given him the Toyota to take to the residence, which was owned by friends of Calvin's, to "hold for him." 6/5/00 Tr. 35 ("I am supposed to hold on to it."); *id.* at 38-40. Calvin had the keys and he had driven the car to the location where it was parked; the police also had seen petitioner and Calvin in the vehicle together on the previous day. 6/5/00 Tr. 38-40. Although petitioner argues that the authority he granted to Calvin over the Toyota terminated when Calvin parked the car (Pet. 17), that disputed factual question was resolved against him in the district court (6/5/01 Tr. 79), and the court of appeals correctly held that Calvin had at least apparent authority to consent to the search (Pet. App. 3a). That determination involves the application of settled principles to the particular facts of this case and does not warrant further review.

3. Petitioner also challenges (Pet. 17-20) his 20-year concurrent sentence for illegally reentering the United States after deportation. That sentence was authorized by 8 U.S.C. 1326(b)(2), which provides a 20-year maximum term of imprisonment for Section 1326 violators who, like petitioner, have been convicted of an aggravated felony before deportation. In the absence of an enhancement based on an alien's prior convictions,

Section 1326(a) establishes a two-year maximum for the illegal reentry offense.[2]

In *Almendarez-Torres* v. *United States*, 523 U.S. 224 (1998), the Court held that neither 8 U.S.C. 1326 nor the Constitution requires that a Section 1326 indictment allege the fact of a defendant's prior aggravated felony conviction before the sentencing court may impose an enhanced sentence under Section 1326(b)(2) based on that conviction. Petitioner contends (Pet. 17-19) that *Almendarez-Torres* should be overruled in light of this Court's decision in *Apprendi* and that his sentence on the illegal entry count therefore be vacated because the indictment did not allege his prior aggravated felony conviction.

Almendarez-Torres, however, survives *Apprendi* and was correctly decided. As the Court stressed in *Almendarez-Torres*, that case involved recidivism, which is "as typical a sentencing factor as one might imagine." 523 U.S. at 230. The Court found no federal statute that clearly makes recidivism an element of an offense that must be charged in an indictment. *Ibid.* *Almendarez-Torres* was therefore markedly different from *Apprendi*, which involved the element of mens rea, "perhaps as close as one might hope to come to a core criminal offense 'element.'" 530 U.S. at 493. By holding in *Apprendi* that "any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt," *id.* at 476,

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[2] Section 1326(b)(1) also authorizes a maximum sentence of ten years' imprisonment in the case of an offender with a prior felony conviction that does not meet the definition of an aggravated felony, or an offender with three misdemeanor convictions involving drugs or crimes against the person.

the Court did not disturb the holding of *Almendarez-Torres* that prior convictions may be treated as sentencing factors.

The Court was correct in declining to disturb *Almendarez-Torres*. Principles of notice and fundamental fairness do not require that an indictment charge, or that a jury find, that a defendant had a prior conviction in order for the defendant to be sentenced to a longer term as a recidivist. A defendant cannot claim surprise by the fact of such a conviction, because he previously experienced the criminal process that resulted in the conviction. Nor will a prior conviction ordinarily present any significant factual dispute for the fact-finder to resolve. As the Court observed in Apprendi, "there is a vast difference between accepting the validity of a prior judgment of conviction entered in a proceeding in which the defendant had the right to a jury trial and the right to require the prosecutor to prove guilt beyond a reasonable doubt," 530 U.S. at 496, which *Almendarez-Torres* permits, and allowing a judge rather than a jury to find in the first instance facts that "relate to the commission of the offense itself," *ibid.* (internal quotation marks omitted). As the Court pointed out in *Jones* v. *United States*, 526 U.S. 227, 249 (1999), "[o]ne basis for that possible constitutional distinctiveness" of the treatment of prior convictions "is not hard to see: unlike virtually any other consideration used to enlarge the possible penalty for an offense, * * * a prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees." See *Apprendi*, 530 U.S. at 488 (noting the "certainty [in *Almendarez-Torres*] that procedural safeguards attached to any 'fact' of prior conviction").

This case moreover would be a poor vehicle in which to address the constitutional question posed by petitioner with respect to *Almendarez-Torres* because his Section 1326 sentence runs concurrently with the life sentence imposed on his drug conspiracy conviction. Even if petitioner's sentence on the drug count were limited to the 20-year maximum term of imprisonment authorized by 21 U.S.C. 841(b)(1)(C) for cocaine trafficking offenses involving any amount of cocaine, the concurrent sentence on the Section 1326 illegal reentry count would not add to petitioner's total term of imprisonment.

CONCLUSION

With respect to petitioner's claim that his life sentence on the drug conspiracy count constituted reversible error (identified by petitioner as questions presented I and II (Pet. i)), the petition for a writ of certiorari should be held pending this Court's decision in *United States* v. *Cotton*, cert. granted, No. 01-687 (Jan. 4, 2002), and then disposed of accordingly. In all other respects, the petition should be denied.

Respectfully submitted.

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